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# CHICAGO-KENT LAW REVIEW

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### NONPROFIT OVERSIGHT UNDER SIEGE

SYMPOSIUM EDITORS

DANA BRAKMAN REISER AND EVELYN BRODY

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EXILE TO MAIN STREET: THE I.R.S.'S  
DIMINISHED ROLE IN OVERSEEING

TAX-EXEMPT ORGANIZATIONS *Evelyn Brody* 859  
*and Marcus Owens*

The Internal Revenue Service's post-Citizens United approach to political activity by would-be tax-exempt organizations has threatened the financial health of the entire agency. Suffering from a siege mentality in the best of times, the IRS predictably and understandably responded to the asserted "scandal" by retreating into a shell of bureaucratic reshuffling, management mumbo-jumbo, and paper moving. A fresh cadre of senior management lacking relevant experience has overhauled the exempt-organization function and emphasized granting recognition of exemption now and (possibly) asking questions later. The new self-certification process of exemption for small charities could also be setting the agency up for the next debacle. There has never been a better time to apply for tax-exempt status or to push the boundaries of permissible activities.

Will the IRS's decision to exile the Exempt Organization Division from Washington D.C. to Cincinnati remove the exempt-organization function from the glare of D.C.'s partisanship or instead stifle the effectiveness of the IRS's role in charity and nonprofit oversight? Should the IRS even be the locus of regulation for political activity by tax-exempt organizations? While we await revised regulations on political activity by social welfare organizations (promised after the 2016 presidential election), the IRS has the responsibility to promptly and transparently air appropriate substantive standards.

POLITICS, DISCLOSURE, AND STATE LAW

SOLUTIONS FOR 501(c)(4) ORGANIZATIONS *Linda Sugin* 895

Since the Supreme Court's 2010 decision in *Citizens United v. FEC*, there has been an explosion in section 501(c)(4) organizations active in politics. Unable to effectively process applications, the IRS mishandled organizations with conservative political ties, producing a scandal from which the agency has yet to recover. It proposed regulations that would have helped it more easily determine eligibility for 501(c)(4) exemption, but after massive public outcry, the regulations were withdrawn. No new regulations will be proposed before the 2016 presidential election.

Given the federal government's inability to address the problem of dark money politicking by 501(c)(4) organizations through either federal tax law or federal election law, this article considers whether state nonprofit law can fill that gap. It describes the efforts taken by California and New York to limit the influence of out-of-state anonymous money in state elections, and considers the policies that states might pursue in regulating politicking by nonprofits under their jurisdiction. While it argues that states are appropriately concerned about protecting charities from the taint of political non-charitable nonprofits, and legitimately concerned about protecting donors to all nonprofits, it is ultimately skeptical of the states' ability to protect charities, donors, and voters.

## FRAGMENTED OVERSIGHT OF NONPROFITS IN THE UNITED STATES: DOES IT WORK? CAN IT WORK?

*Lloyd Hitoshi Mayer* 937

The United States is well known for its distinctive, although not unique, division of political authority between the federal government and the various states. This division is particularly evident when it comes to oversight of nonprofit organizations. The historical focus of federal government oversight has been limited primarily to qualification for tax exemption and other tax benefits, with more plenary power resting with state authorities. Over time, however, the federal government's role has come to overlap significantly with that of the states, and many nonprofits have become subject to regulation by multiple states as their operations and donor bases expand across state lines.

This Article draws on the growing literature addressing fragmentation of oversight in other contexts to identify possible advantages and disadvantages of such fragmentation with respect to nonprofits. It concludes that the current allocation of responsibilities between the states and the federal government, including the limited areas of overlap, results in relatively effective oversight given the resource and other constraints under which these governments operate. It further concludes, however, that there are certain areas where improvement is possible. More specifically, it recommends federal consolidation of information gathering and financing of oversight, increased coordination between the federal government and the states with respect to enforcement actions, and increased coordination among states with respect to regulation of charitable solicitations. It also recommends that the federal government should both halt and consider rolling back its encroachment into the legal requirements for governance of nonprofits as they relate to the primarily state law fiduciary duty of care.

## THE CHARITY COMMISSION FOR ENGLAND AND WALES: A FINE EXAMPLE OR ANOTHER FINE MESS?

*Debra Morris* 965

The ability of the Charity Commission for England and Wales to regulate the charitable sector effectively has been repeatedly called into question in recent years. At the same time, public sector funding cuts have led to its budget being almost halved in real terms since 2007/08. Numerous official reviews and inquiries into its effectiveness have highlighted its weaknesses and raised concerns about it failing to take sufficient action to prevent abuses of charitable status. In response to the Commission's claims that it lacks sufficient legal powers to deal with such abuse, new legislation has been passed which will fill some of these gaps. A greater concern, however, is how the Commission is to be adequately resourced in the future. This article examines some of the reasons behind the recent intense scrutiny that the Charity Commission has experienced and considers what the future will hold for the regulator.

EUROPEAN NON-PROFIT OVERSIGHT:  
THE CASE FOR REGULATING FROM  
THE OUTSIDE IN

*Oonagh B. Breen* 991

When it comes to the regulation of non-profits, the European Commission experiences many of the same pressures and constraints faced by national charity regulators. It suffers, however, from an added disadvantage in that, arguably, it lacks jurisdictional competence to regulate non-profits qua non-profits. This article explores the consequences of the Commission's unsuccessful attempt to secure the passage of its proposal for a European Foundation Statute ("EFS"). Notwithstanding the European Council's inability to muster the necessary Member State unanimity required to pass the proposal and its subsequent demise, the Commission is still dogged by the problems it identified as giving rise to the need for the EFS in the first instance. Against this background, Part I reviews the rationale for the EFS proposal, the political concerns that left it vulnerable to veto and the structural challenges faced by the Commission in legislating for non-profits at a European level. The argument is advanced that extant a purely functional approach, European regulation of nonprofits from "the inside out" is difficult in the absence of a valid treaty basis.

Part II proceeds to examine recent NGO attempts to influence the Financial Action Task Force ("FATF") reform process (supported by the European Commission) and to demand a fairer process under FATF Recommendation 8 for dealing with NGOs. The European Commission's role in assisting NGOs to bring pressure on the FATF to be more accountable and transparent in its dealings presents an interesting vignette of one regulator laying siege to another for the greater good of better non-profit oversight. Arguably, the Commission's attempts at "regulating from the outside in" have led to it demanding a higher level of transparency of the FATF than it has been willing to provide to NGOs itself in the past, while simultaneously enhancing Commission-NGO relations. This article concludes that it is now timely for the European Commission to be alert to the possibilities of regulating from the outside in on occasions when it may not be so possible to regulate from the inside out.

AUSTRALIA – TWO POLITICAL NARRATIVES  
AND ONE CHARITY REGULATOR CAUGHT  
IN THE MIDDLE

*Myles McGregor-Lowndes* 1021

After two decades of debate about the regulation of the nonprofit sector, Australia established a national charity regulator in December 2012. The creation of the Australian Charities and Not-for-profits Commission ("ACNC") had as one of its objectives to reduce red tape, and to increase clarity by enacting a statutory definition of charity. Less than two years later, a new government proposed to abolish the ACNC, also in the name of reducing red tape. There appears to be a paradox—or at least diametrically opposed views about red tape reduction and how it can be achieved. With the government nearly two-thirds through its current term, it is no closer to articulating the detail of an alternative to the ACNC that will be a reduction in red tape. This paper examines the paradoxical red tape views, the actual performance of ACNC red tape reduction and the proposed options for red tape and ACNC reform.

REFORMING THE REGULATION OF POLITICAL  
ADVOCACY BY CHARITIES: FROM CHARITY  
UNDER SIEGE TO CHARITY  
UNDER RESCUE?

*Adam Parachin* 1047

A newly elected liberal federal government in Canada has pledged to reform the legal distinction between charity and politics. This paper provides context to this reform initiative, linking it to a controversial political activities audit program funded by the former conservative federal government. It identifies three distorting ideas about charity—that charity can be understood as a tax ex-

penditure, economic or neutral concept—that should be eschewed in the reform process. It also identifies three characteristics of charity—the capacity of charities for thought leadership, the pervasiveness of messaging in charitable programming and the distinctiveness of charity and government—that should guide reformers.

## THE PIPER LECTURE

### DOES WORK LAW HAVE A FUTURE IF THE LABOR MARKET DOES NOT?

*Noah D. Zatz* 1081

This Essay is based on the 37th Annual Kenneth M. Piper Lecture. It offers a new perspective on the much-discussed “future of work.” That discussion typically highlights changes within the labor market that undermine the employment relationship’s role as the bedrock for work regulation. But might something even deeper be afoot, namely the disintegration of “the labor market” itself? Several recent developments challenge the legal construction of employment as occurring wholly inside a distinctive, and distinctively economic, market sphere. This Essay considers Uber and the relationship between work and “sharing,” Hobby Lobby and the relationship between work and religion, the unrest in Ferguson and the relationship between work and criminal justice, and Friedrichs and the relationship between work and politics. Each presents a conservative challenge to labor and employment law by blurring the boundaries between the labor market and other spheres, not by purging the labor market of noneconomic intrusions in the manner of *laissez faire*. This development presents a conundrum for traditional labor and employment law, which simultaneously defines its object in market terms while aspiring to reshape by incorporating certain nonmarket values.

## STUDENT NOTES

### 3-D BIOPRINTING: NOT ALLOWED OR NOTA ALLOWED?

*Robert Jacobson* 1117

In 1984, Congress passed the National Organ Transplantation Act (NOTA) to improve the supply of vital human organs. A key provision of NOTA was the prohibition of acquiring, receiving, or otherwise transferring human organs. In effect, this provision bans the purchase of human organs. However, due to recent breakthroughs in 3-D bioprinting technology, scientists are on the verge of being able to create lab-grown organs suitable for transplantation. This Note will examine the applicability of NOTA to 3-D bioprinting technology and recommend amendments to NOTA that would clarify the legality of 3-D bioprinting.

### DON'T CALL ME CRAZY: A SURVEY OF AMERICA'S MENTAL HEALTH SYSTEM

*Justin L. Joffe* 1145

Unfortunately, the typical exposure to mental illness for most Americans comes via tragic mass shootings or highly publicized celebrity mental breakdowns. However, the vast majority of mentally ill individuals are not violent murderers or hyper-tweeting celebrities. Rather, they are the ordinary, everyday people that make up the tens of millions of American adults suffering from some form of mental illness. The American mental health system has a lamentable history. The initial policy of locking up mentally ill individuals in jails transitioned to a system of confinement in asylums that quickly became notorious for their poor living conditions and treatment. The mid-twentieth century then saw a dramatic shift to a policy of deinstitutionalization, which produced an underfunded, and essentially non-existent, system of community-based care that left mentally ill individuals without access to treatment and thrust many into homelessness and the criminal justice system. Fortunately, the American mental health system has seen some positive changes in recent years such as the adop-

tion of more lenient involuntary commitment laws in certain states as well as the development of mental health court systems that aim to divert mentally ill individuals from prisons into treatment programs. This Note argues that the persistent stigmatization of the mentally ill remains the most significant roadblock to a fully effective mental health system and proposes various strategies to reduce stigmatization in the United States.

DNA STORAGE BANKS: THE IMPORTANCE  
OF PRESERVING DNA EVIDENCE TO  
ALLOW FOR TRANSPARENCY AND THE  
PRESERVATION OF JUSTICE

*Cristina Martin* 1173

What is the duty to preserve information in today's society? In order for humanity to evolve, change and flourish in the future, society needs to preserve its information from the past. In the criminal justice field, preservation of evidence has special significance. DNA evidence in particular has become a helpful aid for innocent defendants who have been improperly imprisoned. Over the past twenty years, the number of exonerations of imprisoned criminal defendants has increased dramatically. With the advancement of technology, old, previously untestable or improperly tested DNA evidence will need to be retested. However, most states do not have proper repositories for storage of such evidence or even statutes which require the storage and retesting of DNA samples. This note discusses the importance of retention of DNA and critiques current DNA retention practices on both the state and federal level. It proposes the creation of central evidence storage facilities in each state as well as uniform DNA retention statutes. It then addresses criticism to these proposed measures, such as Fourth Amendment concerns and administrative and funding issues. Despite these concerns, the preservation of DNA is paramount and will provide for much-needed transparency in the forensic sciences and criminal justice system.



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